TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 115.

CHARLES GRING, PLAINTIFF IN ERROR,

vs.

LIZZIE IVES AND PAT IVES, BY THEIR FATHER AND NEXT FRIEND, P. H. IVES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

(FILED [illegible], 1901.)

(21,800.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 5, 1911.

1 *Petition for Writ of Error.*

In the Supreme Court of the State of North Carolina.

LIZZIE IVES et al., Plaintiff-,
vs.
CHARLES GRING, Defendant.

Comes now the above named, Charles Gring, appellant, by his attorney, Walter Clark, Jr., and says: That on the 17th day of February, 1909, A. D. a final judgment was rendered in the above entitled matter against your petitioner by the Supreme Court of the State of North Carolina, that being the highest court of law and equity in said State of North Carolina, wherein it was adjudged that your petitioner was responsible and liable for the injury received by the marine railway of the plaintiff from the tug of your petitioner, contrary to the provisions of the River and Harbor Act of the United States approved March 3, 1899 and to the action of the Secretary of War of the United States Government in establishing harbor lines on May 13th, 1902, at Elizabeth City, N. C.

All of which appears in the record, opinion and final judgment of said Supreme Court, adjudging that your petitioner was legally responsible for the said injury to the marine railway of the said plaintiff and requiring him to pay for the same, whereby manifest error has happened to the great damage of your petitioner, who has filed with this petition his assignments of errors.

Wherefore said Charles Gring, your petitioner, appellant prays that a writ of error may issue to the Supreme Court of the
2 State of North Carolina for the correcting of the errors complained of, and that a duly authenticated transcript of the records, proceedings and papers herein may be sent to the United States Supreme Court.

WALTER CLARK, JR.,
Attorney for Charles Gring, Appellant.

Allowance of Writ.

In the Supreme Court of the State of North Carolina.

LIZZIE IVES et al., Plaintiff-,
vs.
CHARLES GRING, Defendant.

Desiring to give the petitioner an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition and in the assignment of errors filed herewith, it is hereby ordered that a writ of error be allowed to said court,

and that the same be made a supersedeas upon the filing of a bond in the sum of Fifteen Hundred ($1500.00) Dollars.

Witness my hand, this 14th day of May, 1909.

WALTER CLARK,
Chief Justice of the Supreme Court
of the State of North Carolina.

3 *Assignments of Error.*

In the Supreme Court of the State of North Carolina.

LIZZIE IVES et al., Plaintiff-,
vs.
CHARLES GRING, Defendant.

Now comes Charles Gring, the defendant and appellant in the above entitled cause, and in connection with his petition for a writ of error herein, makes the following assignments of error:

First.

That the Court erred in holding and adjudging that the lower court was correct in refusing to give the following instruction to the jury, "Upon the whole evidence in the case, the plaintiffs are not entitled to recover and you will answer the first issue, "No."'

Second.

That the Court erred in holding and adjudging that the lower court was correct in refusing to give the following instruction to the jury, "If you believe all the evidence in the case, the plaintiffs are not entitled to recover and you will answer the first issue, "No."'

Third.

That the Court erred in adjudging and holding that the lower court was correct in refusing to give the following instruction to the jury, "If you shall find from the greater weight of the evidence in the case that the United States Government had established a harbor line for Pasquotank River at Elizabeth City, N. C., at the time of the collision and that the railway of the plaintiffs extended beyond the same, at the time of the collision and that the collision
4 occurred beyond the harbor line so established and if you shall further find from the greater weight of the evidence in this case that this was the proximate cause of the injury, then you will answer the second issue, "Yes."' And the Court further erred in holding and adjudging that said refusal was not in conflict with the River and Harbor Act approved March 3, 1899.

Four.

That the Court erred in affirming the judgment of the lower court, to-wit, the Superior Court of Pasquotank County, North

Carolina; and in not reversing said judgment; and in holding that the defendant was legally responsible for said injury to said railway of plaintiff and that such holding was not repugnant to the River and Harbor Act approved March 3, 1899; and in not remanding the case for further proceedings.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of North Carolina, before you, or some of you, being the highest court of law and equity of the said State of North Carolina in which a decision could be had in the said suit between Charles Gring, plaintiff, and Lizzie Ives and Pat Ives, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statue of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission: a manifest errer hath happened to the great damage of the said Charles Gring as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the
6 United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of May, in the year of our Lord one thousand nine hundred and nine.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

W. L. GRANT,
Clerk of the Circuit Court of the United States.

Allowed by
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

7 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Lizzie Ives and Pat Ives, Represented by Their Father and Next Frie-d, P. H. Ives, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of North Carolina, wherein Charles Gring is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 14th day of May, 1909.

WALTER CLARK.
Chief Justice of the Supreme Court of the State of North Carolina.

We hereby acknowledge and accept service of the within waiving service of the same by sheriff or U. S. Marshal, but without prejudice to us upon the merits of the appeal.

AYDLETT & EHRINGHAUS
Attorneys for Defendants in Error.

May 22/09.

8 *Supersedeas Bond.*

LIZZIE IVES et al., Plaintiff-,
vs.
CHARLES GRING, Defendant.

Know all men by these presents, that we, Charles Gring, as principal and L. S. Blades as surety are held and firmly bound unto Lizzie Ives and Pat Ives, the plaintiffs in the above entitled cause, in the sum of One Thousand ($1,000.00) Dollars to be paid said obligees, their successors, representatives, heirs and assign to the payment of which well and truly, to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this 6th. day of May, 1909.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of North Carolina; Now Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and answer all costs and damages

if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES GRING. [SEAL.]
L. S. BLADES. [SEAL.]

STATE OF NEW JERSEY,
County of Camden:

Charles Gring the above named principal in the annexed bond, personally appeared before me and being sworn, says, That he is a resident of this State and is worth $1,000.00 One Thousand Dollars, over and above all the property owned by him exempt from execution and over and above all liens and debts.

CHARLES GRING.

9 Sworn to and subscribed before me, this sixth day of May, 1909.

EDWARD C. WADDINGTON,
Notary Public.

My commission expires November 12th, 1912.

NORTH CAROLINA,
Pasquotank County:

L. S. Blades, personally appeared before me, and being duly sworn says, That he is the surety named in the annexed bond and that he is a resident of the state and that he is worth One Thousand, ($1,000.00) Dollars, over and above all property owned by him exempt from execution and over and above all liens and debts.

L. S. BLADES.

Sworn to and subscribed before me, this 12th. day of May, 1909.

W. W. GRIFFIN,
Notary Public.

My commission expires September 26th. 1909.

Approved.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

(Filed May 14, 1909.)

10 LIZZIE IVES et al., Plaintiffs,
vs.
CHARLES GRING, Defendant.

NORTH CAROLINA,
Pasquotank County:

Petition.

Lizzie Ives and Pat Ives, by their father Pat Ives, respectfully showeth the court that they have a just and meritorious cause of

action against Charles Gring, for injury to the railways located in Elizabeth City, known as the J. F. Snell railways, on the Pasquotank River, amounting to $887.50. That they are infants under twenty-one years of age without any general or testamentary guardian, and that the said Charles Gring refuses to pay them for the said damages, and it is necessary to institute legal proceedings to collect same.

That they respectfully pray the court that they may be permitted to come into court and bring an action by next friend duly appointed by the court.

LIZZIE IVES & PAT IVES,
By Their Father, P. H. IVES.

Order.

Upon reading the above petition, and it appearing to the court that P. H. Ives, father of Lizzie Ives and Pat Ives, is a suitable person to represent them, it is ordered by the court that P. H. Ives be, and he is hereby appointed next friend, to represent the said Lizzie Ives and Pat Ives, who are minors under twenty-one years of age without any general or testamentary guardian. And
11 that they are authorized to bring action against Charles Gring by their next friend, and prosecute same as provided by law.
October 31st, 1907.

W. H. JENNINGS,
Clerk Superior Court.

PASQUOTANK COUNTY:

In the Superior Court.

LIZZIE IVES and PAT IVES, by Their Father and Next of Friend, P. H. IVES, Plaintiffs,
vs.
CHARLES GRING, Defendant.

Summons for Relief.

THE STATE OF NORTH CAROLINA:

To the Sheriff of Pasquotank County, Greeting:

You are hereby commanded to summon Chas. Gring, the Defendant above named, if he be found within your County, to be and appear before the Judge of our Superior Court, at the Court to be held for the County of Pasquotank at the Court House in Elizabeth City, N. C., on the first Monday after the first Monday of January, it being the 13th, day of January 1908 and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said County, within the first three days of said term; and let the said Defendant take notice that if he fail to answer the complaint within the time required by law, the Plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said Court this 31st. day of October, 1907.

W. H. JENNINGS,
Clerk Superior Court, Pasquotank County.

12 The following return appears on the back of said Summons:

Received November 1, 1907. The defendant Chas. Gring not to be found in my county.

CHAS. REID,
Sheriff of Pasquotank County,
Per R. H. RAPER, *D. S.*

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES,
Plaintiffs,
vs.
CHAS. GRING, Defendant.

Affidavit.

P. H. Ives, next friend of the Plaintiffs aforesaid, being duly sworn, says that the defendant is a non-resident of the State of North Carolina and after due diligence cannot be found in the State.

That he is informed that he is a resident of the State of Pennsylvania.

That the defendant owns several steam tugs which ply in the waters of North Carolina, and that the Plaintiffs have a good and meritorious cause of action against the defendant as set out in their complaint, which is hereto attached and marked "Exhibit A." and made a part of this affidavit, and this court has jurisdiction of the said cause of action.

Wherefore plaintiffs pray the court that an attachment issue against the property of the defendant, and that publication be made as provided by law.

P. H. IVES.

13 Sworn to and subscribed before me, this 31st day of October 1907.

W. H. JENNINGS,
Clerk Superior Court.

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES, Plaintiffs,
vs.
CHAS. GRING, Defendant.

Order of Publication.

It appearing to the Court that the defendant is a non-resident of the State of North Carolina, and after due diligence cannot be found in the State; and has property in the State; and that the plaintiffs have a good and meritorious cause of action against the defendant, of which this court has jurisdction:

It is therefore ordered and adjudged by the court that publication be made in the Tar Heel, a newspaper published in Elizabeth City for four consecutive weeks, notifying the defendant to appear at the next term of the Superior court to be holden for the County of Pasquotank, on the first Monday after the first Monday of January, 1908, being the 13th, day of January, 1907, and answer or demur as he may be advised.

The defendant is also notified that attachment has issued against his property returnable at the said term of said court.

The purpose of this action is to recover damages for injury
14 to the railways of the plaintiffs in the sum of Eight Hundred and Eighty-seven Dollars and Fifty-seven cents.

It is further ordered that a publication of this order shall be a sufficient notice.

W. H. JENNINGS,
Clerk Superior Court.

October 31st, 1907.

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES, Plaintiffs,
vs.
CHAS. GRING, Defendant.

Bond.

Whereas the plaintiffs have prayed for and obtained a writ of attachment against the property of the defendant and are required to enter into an undertaking in the sum of Two Hundred Dollars:

Now, therefore we, Lizzie Ives, P. F. Ives and P. H. Ives and C. S. Ives, acknowledge ourselves indebted to the defendant in the sum of Two Hundred Dollars, for the faithful payment of which we bind ourselves, exec-tors and administrators, firmly by these presents.

The condition of the above obligation is such that if the plaintiffs shall prosecute to success their attachment, or shall pay such damages to the defendant as he shall sustain by reason of
15 said attachment, then this obligation to be null and void, otherwise to remain in full force and effect.

P. F. IVES,
By P. H. IVES,
Next Friend.
LIZZIE IVES,
By P. H. IVES,
Next Friend.
P. H. IVES.
C. S. IVES.

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES, Plaintiffs,
vs.
CHARLES GRING, Defendant.

Order of Attachment.

It appearing to the Court that the plaintiffs are entitled to writ of attachment against the defendant as set out in their affidavit in this cause:

It is therefore ordered by the Court that writ of attachment issue to the Sheriff of Pasquotank County demanding him to *sieze* and safely keep such property of the defendant as he shall find, or a sufficient amount to cover the demand made in this cause, to wit: Eight hundred and Eighty-seven & 57-100 dollars, and the cost of this action, and return the same at the next term of this Court to be holden for the County of Pasquotank on the first Monday after the first Monday in January, 1908, being the 13th, day of January, 1908.

And herein fail not.

This 31st, day of October, 1907.

W. H. JENNINGS,
Clerk Superior Court.

16 The following endorsement appears on the back of said order: Received Oct. 31, 1907. Executed Nov. 4th, 1907 by levying on the following property, viz: 1 Tug Boat, by name Curtain, belonging to said defendant, Chas. Gring. Chas. Reid, Sheriff, per R. H. Raper, D. S., Pasquotank County.

NORTH CAROLINA,
Pasquotank County:

PAT IVES and LIZZIE IVES, by Their Next Friend, P. H. IVES,
Plaintiffs,
vs.
CHARLES GRING, Defendant.

Bond of Defendant.

Whereas the plaintiffs have obtained an attachment against the property of the defendant to secure the indebtedness that may be recovered against the defendant; and whereas the said defendant wants to redeem the property and to give bond for the said indebtedness:

Now, therefore, we Charles Gring and L. S. Blades acknowledge ourselves indebted to the plaintiffs in the sum of Fifteen Hundred Dollars, the faithful payment of which we bind ourselves executors and administrators, firmly by these presents.

The condition of the above obligation is such that if the defendant shall pay to the plaintiff- such judgment as *he* may recover in the above entitled cause now pending in Superior Court of Pasquotank County, then and in that event, this obligation to be null and void. Otherwise to remain in full force and effect.

CHAS. GRING,
By CAPT. J. W. HARRISON.
L. S. BLADES.

17 NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES,
Plaintiffs,
vs.
CHARLES GRING, Defendant.

Complaint.

The plaintiffs, complaining of the defendant, allege:

First.

That the plaintiffs are minors under twenty-one years of age and that P. H. Ives their father, is their duly appointed next friend.

Second.

That the defendant is a non-resident of the State of North Carolina.

Third.

That the plaintiffs are owners of and in possession of a certain marine railway located in the corporate limits of Elizabeth City, on

what is known as the J. F. Snell property, and known as the J. F. Snell railway, being situated on the Pasquotank River and extending from the rear of the home lot of said Snell out in the Pasquotank River.

Fourth.

That the defendant is the owner of the Tug "Curtain", and that on or about the 24th day of December, 1905 the defendant ran *its* said tug into the railways of the plaintiffs and seriously damaged the same, breaking the railways and unfitting them for use.

Fifth.

That the said injury was done carelessly and negligently by the said defendant in the management and running of *its*
18 boat, in that *it* carelessly and negligently ran *its* said tug out of the usual way of travel and out of the usual channel and recklessly ran *its* said tug on the ways of the plaintiff and broke the cradle and the bed logs and other parts of said ways and causing the said injury as aforesaid.

Sixth.

That by reason of the said negligent and careless acts and doings of the defendant, and the injury to the said railways, the plaintiffs have been damaged in the sum of $887.57.

Wherefore plaintiffs pray judgment against the defendant for Eight Hundred Eighty Seven & 57-100 Dollars, and for the cost of this action, and for such other and further relief as the nature and circumstances of the case may demand.

AYDLETT & EHRINGHAUS,
Att'ys for Plaintiffs.

P. H. Ives being duly sworn, says that the foregoing complaint is true of his own knowledge except those matters and things stated upon information and belief, and as to those, he believes it is true.

P. H. IVES.

Sworn to and subscribed before me, this 31st, day of October 1907.

W. H. JENNINGS,
Clerk Superior Court.

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES and PAT IVES, by Their Next Friend, P H. IVES.
Defendant,
vs.
CHARLES GRING, Defendant.

Answer.

The defendant, answering the complaint of the plaintiff- in this cause, says:

19 I. That section- first, second and third thereof are admitted.

II. Answering section fourth thereof, the defendant admits that he is the owner of the tug "Curtain" and that on or about the 24th, day of December, 1905, his said tug ran upon the Marine Railways of the plaintiffs, but he denies that the same was seriously damaged or broken so as to unfit them for use.

III. That sections fifth and sixth thereof are untrue and the same are denied.

For further answer, the defendant says.

IV. That Pasquotank River is a navigable stream of water and the water of said river is between six and seven feet deep at average tide near the shore line of the lot of the plaintiffs upon which is located in part their said Marine Railway. That their said Marine Railway runs from said shore line out into the waters of said river a distance of over one hundred and fifty feet which is under the water of said River and the water of said River is some thirty feet deep at the end of said Railway.

V. That said Railway is constructed as follows: Piles are driven in double column from the shore to the end thereof; these piles are sawed off under the water so as to make a decline of ¾ an inch to the foot from the shore line to the end of the Railway; heavy timbers are bolted along the tops of these piles the entire length and heavy pieces of timber are bolted across them at intervals so as to make a bed-way for said railway; iron rails are run along said bedway upon which runs the "cradle", which is a frame-work of wood and iron upon which vessels are taken and hauled upon the shore to be worked upon, the machinery which does the hauling being located upon the shore.

VI. That this Railway is an unlawful obstruction to the
20 navigation of said River and the plaintiffs have no license from any authority to operate the same in said water and are doing so, as defendant is advised and believes, contrary to law.

VII. That, at the time spoken of in their complaint, which was between nine and ten o'clock on a dark night, the plaintiffs had no light beacon or other thing upon or about said Railway to warn people of the existence of the same and, if they were damaged,

they in this way contributed to their own injury by their own negligence.

VIII. That the United States Government has established a Harbor Line for said River at Elizabeth City, N. C., across which the Railway of the Plaintiffs unlawfully extends; which, defendant is advised and believes, is contrary to law and if the plaintiffs have been damaged they of their own negligence contributed to their injury in thus violating the law.

IX. That the "Cradle" of said Railway was down under the water at the time it was run on by said tug, when it should have been drawn up and upon the shore and if the plaintiffs have been damaged they of their own negligence contributed to their own injury in not having said "cradle" drawn up and upon the shore at the time of the alleged injury.

Wherefore, defendant demands judgment against the plaintiffs that he go without day in this cause, that he recover of the plaintiffs his costs in this behalf incurred and for such other and further relief as he may be entitled to in the premises.

J. HEYWOOD SAWYER,
Attorney for Defendant.

Chas. Gring, the defendant in this cause, being duly sworn in the same, says that the foregoing answer is true of his own
21 knowledge, except as to those matters therein stated on information and belief and as to those he believes it to be true.

CHAS. GRING.

Subscribed and sworn to before me, this the 23rd, day of January, 1908.

ALFRED H. WILLIAMS,
Notary Public.

Commission expires Jan. 21, 1911.

Trial by Jury.

And then at September Term, 1908, of said Court the parties aforesaid, by their said Attorneys, come and announce themselves ready for trial: Then comes the following Jury of good and lawful men, to-wit: J. D. Sawyer, F. P. Markham, L. A. Albertson, N. D. Pendleton, N. C. Hewitt, Jno. W. Parker, W. A. Beaman, H. C. White, Joseph Temple, C. A. Long, B. D. Taylor, Thos. Meads, who being chosen, sworn and empanneled to try the issues of fact between the plaintiffs and the defendant for their verdict say that they find the issues as follows:

LIZZIE IVES et al.
vs.
CHARLES GRING.

Issues.

I. Were plaintiffs injured by the negligence of the defendant as alleged in the complaint?
Answer: Yes.
II. Did plaintiffs contribute to their injury by their own negligence?
Answer. No.
III. What amount of damage are the plaintiffs entitled to recover?
Answer. $300.00.

22 NORTH CAROLINA,
Pasquotank County:

Superior Court, September Term, 1908.

LIZZIE IVES and PAT IVES, by Their Next Friend, P. H. IVES,
Plaintiffs,
vs.
CHARLES GRING, Defendant.

Judgment.

Present, Hon. G. W. Ward, Judge Presiding:
This cause coming now to be heard and the Jury having answered the issues in favor of plaintiff.
It is therefore on motion of Aydlett & Ehringhaus, Attys. for plaintiffs, ordered and adjudged by the Court that plaintiffs recover of defendant the sum of Three Hundred Dollars, amount of damages assessed by the Jury.
It is further ordered that plaintiffs recover of defendant the costs of this action to be taxed by the Clerk.
G. W. WARD, *Judge, etc.*

NORTH CAROLINA,
Pasquotank County:

Superior Court, September Term, 1908.

IVES
vs.
GRING.

The degendant moved for a new trial for errors assigned and to be assigned in case on appeal.
Overruled and Exc. by D'f't.
Judgment and Exc. by D'f't.

The defendant appealed to the Supreme Court. Motion
23 waived in open Court and Bond on appeal fixed at $40.00.
Defendant to have 60 days to serve case on appeal and Plaintiff 60 days to serve counter case or exceptions.

G. W. WARD, *Judge.*

NORTH CAROLINA,
Pasquotank County:

Superior Court.

LIZZIE IVES et als., Pl'ffs,
vs.
CHAS. GRING, Defendant.

Bond.

The undersigned, Chas. Gring, and his Surety, L. S. Blades, are held and firmly bound unto the plaintiffs, Lizzie Ives and Pat Ives, in the sum of Forty Dollars. If the defendant shall pay to the plaintiffs all such costs and damages as shall be recovered against him in the Supreme Court by reason of his appeal in this cause, then this obligation to be void, otherwise, to remain in full force and effect.

Witness their hands and seals this the 1st, day of December 1908.

CHAS. GRING. [SEAL.]
L. S. BLADES. [SEAL.]

L. S. Blades, surety above named, being duly sworn, says that he is worth the sum of Eighty Dollars over and above all debts, obligations and personal and real property exemptions allowed by law.

L. S. BLADES.

Sworn to and subscribed before me Dec. 1, 1908.

W. H. JENNINGS,
Clerk Superior Court.

24 NORTH CAROLINA,
Pasquotank County:

Superior Court, September Term, 1908.

LIZZIE IVES and PAT IVES, by Their Father and Next Friend, P. H. Ives, Plaintiffs,
vs.
CHARLES GRING, Defendant.

Case on Appeal.

Case on appeal to Supreme Court, settled by trial Judge.
Civil action tried before Ward, Judge, and a Jury at the above named term of said Court.
The pleadings show the contentions of the parties.

T. B. HAYMAN, witness for plaintiffs, testified:

Was near the railway. It was still, clear night. Stars shining. A big fire was lighted up on Underwood lot. Electric light at bridge. Lights are in a row along the street near the railway. Do not know how far could see the tug. Was on the bridge and saw the boat run into railway. Heard they had "busted" my schooner. When I got there the tug was on the railway and I stepped from end of pier on to the "guard" of the tug. The tug was diagonally across railway. She was going ahead wide open and backing wide open. She was hung on the ways. Could feel railway shaking. I stayed on the boat awhile and left. Railway built about as described in answer. It would eventually shove all out of shape. The pier along side of railway was about three feet above the water. From where the boat struck pier no room for a barge to come near the shore. There was piling put out on the side of railway. I found barge had hit my schooner and broke her in. She was 150 feet from railway and was tied to dock on shore. It was two years ago last Christmas and was a still, clear night. I stepped from end of
25 pier on the "guard" of the boat. She was 200 feet out of usual line of travel for boats in Pasquotank River.

X-examined:

It was, I suppose, 40 feet from the shore where tug struck the railway. It is some 20 [illegible] 30 feet deep there; it is very deep there, deepest part around there. Do not know about Harbor Line being established. It was 400 feet from fire on Underwood lot to railway. The lot where fire was lower than bridge between it and railway and there were other obstructions between fire and railway. The fire shone all around. There were several houses between fire and railway that obstruct the view. I cannot say that one on the boat could have seen the railway.

E. S. WILLEY, witness for the plaintiffs, testified:

Know Snell ways. I was operating them and had been for 1½ years. I rented from Ives. Was not present. The Captain of the boat came to my house and said he had damaged railways had run tug boat on it. Said he had served it badly and asked what it would cost. He told me to fix them and send bill to defendant. The railway bed is 8 feet wide. They run off at about right angles with the shore at a decline of ¾ inch to the foot. Then rollers and cradle. There were fender piles on each side of the railway. There were piles driven down as fenders. The cradle is left out and is 80 feet long. Twenty feet of the cradle was on shore and 50 feet at least was down in the water. Found cradle off track. Roller boxes were torn up. I fixed it up and notified defendant I had done so. Sent defendant statement for $250.00 and he would not pay it I then got a diver to go down and the bill had run up to $250.00. Had to abandon the ways. Found the bed sills broken in two pieces. Would say damage $1500.00. Repaired them. The boat when it
26 struck the ways was 200 feet out of regular course. It knocked fender piles down. The boat struck cradle at angle

of 45 degrees and was pointed almost straight to the shore. It was heading on the shore. The government has a buoy about opposite the railway on the other side of the channel which is some 800 feet from the railway. The boat was going out and if it had taken a straight course it would have gone South East down the channel. There is a bend around the mouth of Charles Creek and then out. Wrote defendant first September 3rd, 1906.

X-examined:

The entire bedway from shore line is 120 feet in the river. Water 4 or 5 feet at the shore. Where the boat struck the railway it was 25 feet to the bottom of the water. It was navigable water. If railway had not been there boat drawing 25 feet water could have gone there. Boats come between bouy and railway. Don't know anything about government establishing a harbor line. I had no light on railway that night. Government has since required me to keep red light there. I had leased the ways from Ives. They belong to them. Captain Cherry was the one that went to my house.

Plaintiff here rested.

Captain CHERRY, witness for defendant, testified:

We stopped to pick up barge and were running with it alongside. The lights were blinding because they were on the same side of railway. Red bouy in bend. It was dangerous on the other side. The lights were blinding and I could not possibly avoid it. I ran squarely across the railway. We tried to work boat off. I have had them to swing clear across. It was a fair night but not clear.

27 It was about 8:30 o'clock P. M., away after dark. I reported to Mr. Willey and told him lights were very damaging and missleading. I told him to fix it and report to Philadelphia. Willey said there was some trouble but he could work it all right. Could not cost over 50c. or $1.00 to repair the damage I could see. There was no light on the pier. All the damage I saw was $1.00.

X-examined:

Have passed by these ways 200 or more times. I was at wheel that night. I saw one large fire. I missed calculations and swung around. Had barge alongside. The tug was not within 3 feet of the pier when it struck, but drifted. Were going under one bell. The barge was 150 feet long and drew 3½ feet. Tug draws 9 feet. The barge would go right over railway when tug would strike it. Tug could swing 80 feet around. The river is 540 feet between bouy on opposite shore and railway. Saw them establishing the harbor line in 1900, 1901 or 1902.

CLARENCE CHERRY, witness for defendant, testified:

Not related to any of the parties on either side. Served my time around marine railways with Captain Lawrence. Saw this railway in June, 1907. The damage did not amount to anything much. One side log looked like it had broke in two or cracked. Been

around marine railways to help repair them. $20.00 would have repaired cradle and $50.00 or $60.00 would have repaired all other damages. Mr. Snell built railway some 18 or 20 years ago. The iron he used came from old Lawrence railway and had been used for 35 years. Have seen wrought iron eaten up and heads of nails eaten off. In the waters around here the heads of bolts will be destroyed in 8 or 10 years. Cradles are generally left up above the water when not in use. If the cradle had been up that night the tug would have passed over the ways and there would have been no damage to them.

28 X-examined:

If there was no more damage than Mr. Willey told me $80.00 would repair it.

Defendant under objections of plaintiff next introduced what purported to be a blue print copy of the original tracing of map of the harbor lines at Elizabeth City, N. C., as established by the Secretary of War on May 13th, 1902 under the River and Harbor Act of Congress approved March 3rd, 1899.

(Clerk will send to Supreme Court said blue print with Certificates as part of case. It was certified as appeared.)

Defendant testified in his own behalf as follows:

I understand the map and can explain it to the Jury.

According to the map it is about 20 feet from the shore to the Harbor line established by the Secretary of War. First heard from Captain Willey September 3rd, 1906, telling me about my tug running on the way. He asked me to send him check for $50.00.

X-examined:

I just take what appears on the map. Did not tell Mr. Aydlett that my boat had done damage. Have always contended that I was not liable.

Captain ROBERTS, witness for defendant, testified:

I operated the Railway the year before it was struck. The water is 4 feet on top of cradle where it was hurt. The heads of bolts had been eaten off by some cause. We had trouble with the railway. Had trouble with it all during the year. From shore up the ways were in good condition. A piece of track iron 3 or 4 feet long came off. It was easily put back. Had to repair the railway from shore up.

Captain DRINKWATER, witness for defendant, testified:

29 Water around here eats iron; that is, will rust it and wear it out. Roberts and I rented the ways. There was some trouble with roller part. There was piece of track iron broken loose between the cross pieces on the cradle. Witness then showed how a boat would strike and what way it would turn if it should strike the railway in different places and said the fact that she was diagonally across the ways and pointing towards the shore, did not indicate necessarily that she was running toward the shore

at the time she struck the ways. We repaired the ways down to the edge of the water.

Defendant here rested.

T. B. HAYMAN, witness recalled for plaintiffs, testified:
Forward end of tug was on the ways. I stepped on tug right in front of pilot house. A barge 24 feet wide could not have passed between tug and shore. Rollers are in frame and will get out of order sometimes by carelessness. The tug ran right in between two cross logs of the railway.

Mr. BAILEY, witness for plaintiffs, testified:
Work for Dare Lumber Company. In 1906 worked with Willey. I dragged the cradle out and did the repairing. Mr. Gring went down with me and he saw it, it was broken in two pieces. It was knocked off broad-side. Did not use it at all. Rollers were knocked off. It was broken and on the bottom. It had to be taken up. To fix it would have cost $1200.00 or $1500.00. The iron was in good condition. Been working 10 years for Captain Willey. Was not here last March. Ives looked me up and brought me here.

X-examined:

Dragged cradle out out next day after it got broke. Tug broke cradle log in two. Nailed two pieces on it on each side. Could complete the job of repairing it in one hour.

Mr. TILLETT, witness for plaintiffs, testified:
Live on Dry Point just abreast of ways. That was a still, clear night. There was a good light from shore and it could have been seen. The light must have been or could have been seen. Heard crash. Went down and stepped on tug. Bow end was 3 feet out of water. The stern was in water. Tug was backing and going forward and shoved ways out of shape. She would have struck shore in a minute if she had not struck the ways. No room where a 24 foot barge could have been between the tug and the shore.

X-examined:

Not here last March. Ives spoke to me to come here.

Captain WILLEY, recalled by plaintiffs, testified:
It was 15 or 16 feet from where the boat struck to the end of the pier. Defendant Gring did not come to see me but I saw him at the railway. Bailey did the work. Bailey was working on the railway. The tug was 56 feet from the shore when she struck the railway.

P. H. IVES, witness for plaintiffs, testified:
Guardian for children. I rented the property to Mr. Willey. I went over there and saw how they were struck 12 or 15 feet from pier head. They were damaged. Damage $1000.00 or $1200.00.

X-examined:

Never seen all where the damage was done.

Plaintiffs here closed.

Captain GRING, recalled on his own behalf, testified:
I came to Elizabeth City first time on December 26th, 1906.

The issues set out in the record were submitted to the jury by consent.

31 Defendant prayed the Court in apt time to instruct the jury as follows:

I. Upon the whole evidence in the case the *the* plaintiffs are not entitled to recoves and you will answer the first issue, "No."

The Court refused to give this instruction to the Jury, and the defendant excepted—First exception.

II. If you believe all the evidence in the case the plaintiffs are not entitled to recover and you will answer the first issue, "No."

This instruction the Court refused to give to the jury and defendant excepted—Second exception.

III. If you believe all the evidence in the case the plaintiffs were guilty of contributory negligence and you will answer the second issue, "Yes."

This instruction the Court refused to give to the jury and defendant excepted.—Third exception.

IV. If you believe all the evidence in the case the plaintiffs were guilty of contributor- negligence and this contributory negligence was the proximate cause of their injury and you will answer the second issue, "Yes."

This instruction the Court refused to give to the jury and defendant excepted.—Fourth exception.

V. If you shall find from the greater weight of the evidence in the case that the plaintiffs had no light upon or about their railway at the time of the collision to warn vessels passing of the existence of the same and if you shall further find from the greater weight of the *the* evidence in the case that their failure to have such light was the proximate ca-se of their injury, then you will answer the second issue, "Yes."

The Court gave this instruction.

VI. If you shall find from the greater weight of the evi-
32 dence in the case that the U. S. Government had established a Harbor Line for Pasquotank River at Elizabeth City, N. C., at the time of the collision and that the railway of the plaintiffs extended beyond the same at the time of the collision and that the collision occurred beyond the harbor line so established and if you shall further find from the greater weight of the evidence in this case that this was the proximate cause of the injury, then you will answer the second issue, "Yes."

This instruction the Court refused to give to the jury and defendant excepted.—Fifth exception.

VII. If you shall find from the greater weight of the evidence

that the "cradle" of said railway was down under the water at the time of the collision and if you shall further find from the greater weight of the evidence that this was the proximate cause of the injury of the plaintiffs, then you will answer the second issue, "Yes."

This instruction the Court refused to give to the jury, and defendant excepted.—Sixth exception.

The Court stated to the jury the nature of the action and the contentions of the parties, the issues and the burden of proof, as to each, and defin-d actionable negligence and proxi-ate cause to which there was no exception and among other things charged the jury as follows:

The plaintiffs impute negligence to the defendant in that he, through his captain, carelessly and negligently ran his tug out of the usual way of travel in said river, and out of the usual channel, and recklessly ran it the said tug on the railways of the plaintiff causing the damage thereto.

You will first inquire if the ways were injured. Evidence tends to show there was some *some* injury.

Next inquire whether there was a failure of duty on the
33 part of the defendant and if so did that cause the injury?

The right of navigation is paramount but not exclusive and a boat in a navigable stream has a right to take her course and to go to the bank when and where it is necessary to do so provided it does no unnecessary damage and acts without wantonness or malice, but it would not have a right to go recklessly out of its course unnecessarily and thereby injure shore property, and in this case the defendant in the exercise of reasonable care owed the plaintiffs who had their railways out in the river and deep water, the duty not to unnecessarily in a reckless manner run his tug out of its course, on the ways and if the defendant failed in the discharge of his duty and such failure was the proximate cause of the injury then it would be your duty to answer the first issues, Yes. If there was no such failure, of duty on the part of the defendant, answer it No.

If you find from the evidence, burden being on the plaintiffs to show by greater weight of evidence that the defendant fail*ing* to exercise reasonable care and in a reckless manner ran his tug unnecessarily out of its course on to shore and thereby injured plaintiffs' ways, answer Yes.

If you find no failure of duty, answer No.

The Court then charged the jury upon contributory negligence and stated contentions of parties.

The jury answered the issues as set out in the record.

Defendant moved for a new trial for errors assigned and to be assigned in case on appeal.

Motion overruled and defendant excepted.—Seventh excepted.

The Court then render- the judgment set out in the record. Defendant excepted.—Eight- exception.

34 Defendant moved for an appeal to the Supreme Court: Notice waived, appeal granted and appeal bond fixed at $40.00.

Defendant to have 60 day- to serve case on appeal and plaintiffs 60 days thereafter to serve counter case or exceptions.

Defendant relies upon the following exceptions.

I. To the refusal of the Court to give instruction 1 prayed for.

—. To the refusal of the Court to give instruction 2 prayed for.

III. To the refusal of the Court to give instruction 3 prayed for.

IV. To the refusal of the Court to give instruction 4 prayed for.

V. To the refusal of the Court to give instruction 6 prayed for.

VI. To the refusal of the Court to give instruction 7 prayed for.

VII. To the refusal of the Court to grant a new trial.

VIII. To the re-dering of the Judgment set out in the —.

This is case settled on appeal to Supreme Court by the trial judge.

WARD, *Judge.*

Dec. 19, 1908.

NORTH CAROLINA,
Pasquotank County:

In the Superior Court.

Clerk's Certificate.

I, W. H. Jennings, Clerk of the Superior Court of Paspuotank County, State of North Carolina, do hereby certify the fore-
35 going to be a full, true and perfect transcript of the record in a civil action pending in said Court, wherein Lizzie Ives et al. are plaintiffs ane Charles Gring is defendant.

In testimony whereof, I have hereunto sef my hand rnd affixed the seal of said Court, at office in Elizabeth City, N. C., on this 4th day of January, 1909.

W. H. JENNINGS,
Clerk of the Superior Court of Pasquotank County, N. C.

[Docket Entries: Appeal docketed Jan'y 23, 1909; Argued Feb. 3, 1909; opinion by Clark C. J. Filed Feb. 17, 1909.]

36 Supreme Court of North Carolina, Feb. Term, 1909.

#19, Pasquotank.

LIZZIE IVES et al.
v.
CHAS. GRING, Appellant.

Advlett & Ehringhaus for plaintiff;
J. Heywood Sawyer for defendant.

CLARK, *C. J.:*

This is an action for damages to the marine railway of plaintiffs by the tug of the defendant. The evidence is that the tug boat

which was bound down the river, instead of following the usual course, ran diagonally towards the shore and striking the marine railway of plaintiffs damaged it. The captain of the tug boat testified that he knew the locality well having passed it more than 200 times. After the injury, he offered to pay damages but the parties could not agree upon the amount. It was a bright moonlight night and there was also a bonfire on shore and a line of electric lights which lighted up the harbor. There were 540 feet between the end of the marine railway and the buoy on the opposite side, in which space the tug should have passed.

The court properly refused to charge that upon the evidence the plaintiffs were not entitled to recover and to answer the first issue No. Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally or that it was a public nuisance. And if it had been, the tug boat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show. The marine railway had been at that place 18 years and the captain of the tug boat had been by it, he says, more than 200 times.

The court also properly refused to charge, that as a matter of law the plaintiff was guilty of contributory negligence. The burden was upon the defendant to set this up and "prove it on the trial" Rev. 483. There was evidence tending strongly to show that the cause of the injury was the negligence of the defendant. The court properly refused the prayer to instruct the jury that the proximate cause of the injury was the contributory negligence of the plaintiff.

If it were negligence for the plaintiff to leave the cradle, under water on the railway at night, this did not cause the injury.

37 Clearly the proximate cause was the negligence of the tug in not proceeding on its course, in a channel 540 feet wide, but going several hundred feet out of its way, and driving in shore against the marine railway.

The court properly charged that if the plaintiff did not have a light on its marine railway and such failure was the proximate cause to find the plaintiff guilty of contributory negligence. The court also properly refused to charge that if the marine railway extended beyond the harbor line, this was the proximate cause but left the enquiry as to the proximate cause to the jury

Upon the evidence the jury could hardly have found otherwise than that the proximate cause of the injury was the negligent handling of the tug, and its going 200 feet or more out of its course, and outside of the regular channel.

No error.

38 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Pasquotank County:—upon consideration whereof, the Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Eleven 55/100 dollars ($11.55), and execution issue therefor.

39 Supreme Court of North Carolina.

I, Thomas S. Kenan, Clerk of the Supreme Court of North Carolina, do hereby certify that the foregoing is a true and perfect copy of the record in the case of Ives v. Gring on file in this court. Given under my hand and seal of said court on this the 24th day of May 1909.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 21,800. North Carolina Supreme Court. Term No. 115. Charles Gring, plaintiff in error, vs. Lizzie Ives and Pat Ives, by their father and next friend, P. H. Ives. Filed August 20th, 1909. File No. 21,800.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 115.

CHARLES GRING, *Plaintiff in Error,*

vs.

LIZZIE IVES and PAT IVES, by their father and next friend, P. H. IVES.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error to the Supreme Court of the State of North Carolina to review a final judgment of that court wherein the plaintiff in error was held liable in damages for the injury received by the marine railway of the defendants in error because of a collision with a tug-boat of the plaintiff in error, contrary to the provisions of the River and Harbor Act of the United States, approved March 3, 1899, and to the action of the Secretary of War of the United States Government in establishing harbor lines on May 13, 1902, at Elizabeth City, North Carolina.

STATEMENT OF THE CASE.

The defendants in error, Lizzie Ives and others, owned a certain marine railway on the Pasquotank River within the corporate limits of the town of Elizabeth City in the State of North Carolina (Rec., 10), its bedway, 8 feet wide, and running off at right angles from the shore at a decline of ¾ inch to the foot (Rec., 16), extended from the shore line of their lot into the Pasquotank River 120 feet (Rec., 17). The river is a navigable stream and is 5 feet deep at the shore line of the lot of the defendants in error (Rec., 17). That about 8.30 P.M., on the night of December 24, 1905, the tug of the plaintiff in error ran upon the marine railway injuring the cradle and bedway of the same (Rec., 16), said collision occurring 56 feet from the shore line (Rec., 9), and at a point where the water is 25 feet deep and navigable; the tug drew 9 feet of water and at the time of collision was going under one bell (Rec., 17). There was 4 feet of water over the top of the cradle where the tug struck, and at the time of the injury the cradle was under the water (Rec., 16). Generally, the cradles are left above the water when not in use, and if the cradle had been up on the night of the accident the tug could have passed over the railway and there would have been no damage (Rec., 18). The river in question is 540 feet wide from the buoy on the opposite shore to the end of the marine railway, and there was no light on the railway on that night (Rec., 17). That on May 13, 1902, the Secretary of War, under the authority of the River and Harbor Act of Congress, approved March 3, 1899, established harbor lines at Elizabeth City in the State of North Carolina, and that said harbor line so established is about 20 feet from the shore (Rec., 18), and the marine railway of the defendants in error on December 24, 1905,

extended beyond the harbor line about 100 feet (Rec., 17), and the exact point of collision was 56 feet from the shore line and 36 feet out in Pasquotank River beyond the established harbor line.

ASSIGNMENTS OF ERROR.

First.

That the Court erred in holding and adjudging that the lower Court was correct in refusing to give the following instruction to the jury, "upon the whole evidence in the case the plantiffs are not entitled to recover and you will answer the first issue 'No.' "

Second.

That the Court erred in holding and adjudging that the lower Court was correct in refusing to give the following instruction to the jury, "if you believe all the evidence in the case, the plaintiffs are not entitled to recover and you will answer the first issue 'No.' "

Third.

That the Court erred in holding and adjudging that the lower Court was correct in refusing to give the following instruction to the jury, "if you shall find from the greater weight of the evidence in the case that the United States Government had established a harbor line for the Pasquotank River at Elizabeth City, in the State of North Carolina, at the time of the collision, and that the railway of the plaintiffs extended beyond the same at the time of collision, and that the collision occurred beyond the harbor line so established, and if you shall further find from the greater weight of the evidence in this case that this was

the proximate cause of the injury, then you will answer the second issue 'Yes.'" And the Court further erred in holding and adjudging that said refusal was not in conflict with the River and Harbor Act, approved March 3, 1899.

FOURTH.

That the Court erred in affirming the judgment of the lower Court, to wit: the Superior Court of Pasquotank County, North Carolina; and in not reversing said judgment; and in holding that the defendant was legally responsible for said injury to said railway of plaintiff, and that such holding was not repugnant to the River and Harbor Act, approved March 3, 1899; and in not remanding the case for further proceedings.

ARGUMENT.

With reference to the right of review of the question involved in this case we submit that the record as a whole shows clearly that the claim of Federal rights was asserted from the beginning by the plaintiff in error in such manner as to bring it to the attention of the lower Court. The paramount right of navigation in navigable waters was claimed, and it was maintained that any obstruction to navigation without authority from Congress or the legislature was unlawful, constituted a public nuisance and was a direct violation of the provisions of a Federal statute, to wit: Sections 9-12, inclusive, of the River and Harbor Act, approved March 3, 1899. That it further appears from the record that the right, privilege, and authority claimed under the aforesaid Act of Congress were denied by the Court below, and consequently we contend that this Court has jurisdiction of the case at bar.

Appleby vs. Buffalo, ~~212~~ 221 U. S., 524; 172 U. S., 67,

and cases cited therein.

The substantial question presented in this case is whether the lower Court erred in refusing to instruct the jury that defendants in error, upon all the evidence, could not recover, because the acts of negligence complained against were not the proximate cause of the injury, but that the efficient and proximate cause of said collision and consequent damage was the maintenance by the defendants in error of a public nuisance in a navigable river of the United States, expressly contrary to and in violation of a Federal statute, which in addition to prohibiting the same, makes it a misdemeanor punishable by a heavy fine and imprisonment or both. By Section 10 of the Statutes at Large of the United States, Volume 30, Page 1151, it is provided as follows:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, etc., or other structures in any port * * * navigable river, or other water of the United States, outside established ***harbor lines.***"

With reference to establishing the harbor lines, Section 11 of the same statute provides as follows:

> "That where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors he may, and is hereby, authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

Section 12 of the same statute provides penalties for violation of the foregoing sections of said Act, the substance of which is that one violating the same shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment not exceeding one year or by both. It further provides for the summary removal of said structures by injunction, etc., under the direction of the Attorney-General of the United States.

It must be conceded that the Pasquotank River is a navigable stream, that the defendants in error were not affirmatively authorized by Congress or by any legislative power to construct or maintain a marine railway or any other structure extending into the Pasquotank River one hundred feet beyond the harbor line shown to have been established by the Secretary of War pursuant to the Act of Congress. The record further shows that the collision in question occurred at night time at a point 36 feet outside the harbor line so established, where the water was 25 feet deep and navigable. The lower Court held as a matter of law on the question of the validity of the establishment of the harbor line by the United States Government as follows (Rec., 23):

> "The Court properly refused to charge that upon all the evidence the plaintiffs were not entitled to recover and to answer the first issue 'No.' Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there *illegally* or that it was a *public nuisance.*"

We submit that this doctrine is a denial of the validity and legal effect of the United States statute hereinbefore set

forth, and that it is at variance with the decided cases throughout the United States. This Court recently, in the case of Hannibal Bridge Company vs. The United States, 221, U. S. 194, in construing Section 18 of this same Act of Congress, held that said Act is within the constitutional powers of Congress, and was enacted to carry out the declared policy of the Government as to the free and unobstructed navigation of the waters of the United States over which Congress has paramount control in virtue of its power to regulate commerce.

It goes without question that if the constitutionality of this Act of Congress is settled, then the locating and maintaining of this private structure in the manner hereinbefore indicated is illegal and a clear violation of the statute, and no private necessity would prevail against the action and control of the Federal Government in the premises.

The defendants in error claim damages upon allegations of ordinary negligence, while at the very moment of the collision in question they are guilty of maintaining a public nuisance in a navigable river of the United States, placing themselves in an unlawful and illegal position, outside of a duly established harbor line, where the captain navigating the tug had a right to assume, as a matter of law at least, that there was no obstruction. In other words, if the defendants in error had complied with the statute law of the United States, and had not placed an obstruction in a navigable stream, the accident would not have happened. In Atlee vs. Packet Company, 21 Wallace (U. S.), 389, the adjacent riparian owner without authority extended a pier out into the Missouri River, to a point where the water was 12 feet deep. The Court held that his right to build this structure in a navigable river was unauthorized and unlawful, and that a riparian owner cannot project a pier or roadway into the deep water of a navigable stream by

virtue of this ownership, and he was held liable in damages for the unlawful structure.

In the case at bar the defendants in error are positively prohibited from building any such structure by the statute, and as the Court in Grand Trunk Ry. *et al.* vs. Backus, 46 Federal Reporter, 216, referring to an attempt to build a wharf outside the established harbor line, says:

> "This structure therefore cannot be lawfully extended by the defendant. If extended it would be an unlawful structure for which they would be subject to indictment and to imprisonment, or fine or both. It would extend into the waters to a depth, if erected, which would make it a public nuisance. That it will work ruinous injury to them, and the commerce they are carrying on is manifest."

Again in Northern Pacific Ry. vs. United States, 44 C. C. A., 136:

> "And, inasmuch as one who places or creates an obstruction in a navigable river without legal sanction thereby creates a public nuisance, the defendant company can only escape liability for its acts by showing that Congress has in fact authorized it to create an obstruction of the kind now in question. From another point of view, we also reach the conclusion that the defendant company was guilty of an unlawful act in placing such an increased burden on its right of way as occasioned an uprising in the bed of the river, and a consequent obstruction to navigation."

To the same effect are the following cases:

38 Fed. Rep., 614;
9 N. J. Equity, 526;
28 N. Y., 396;
72 Maine, 181;
18 Barb. (N. Y.), 277;
9 Can. Sup. Ct., 239,

and cases cited in L. R. A., 59, Vol. 90, Note 7.

We contend that the facts in this case are capable of only one inference: that the proximate cause of this accident was the unlawful and illegal placing and maintaining of a public nuisance in a navigable stream, and we submit that the jury in the first instance should have been so instructed. It will be noted that there is no allegation or claim in this case that the tug captain acted with wantonness or malice, on the contrary, the whole evidence shows the fact to be that he was blinded by the electric lights on the shore adjoining the marine railway, and that the opposite side of the river was dangerous (Rec., 17), so that his only acts of negligence consisted of a failure to calculate the exact point where an unlawful obstruction to navigation was located, said structure being four or five feet under water and unlighted at the time.

We further respectfully urge that error was committed by the lower Court in refusing to grant the instruction contained in the third assignment of error, for plaintiff in error was clearly entitled to have this fact submitted to the jury in addition to the other evidence in the case; that if they should find from the greater weight of the evidence in the case, that the harbor line had been established as stated herein at the time of the collision, and that the structure in question extended beyond said harbor line at the time of the collision, and if they should find from the greater weight of the evidence in the case that this was the proximate cause of the injury, then they should answer the second issue "Yes." It is uncontradicted, as hereinbefore stated, that the Secretary of War had established harbor lines regulating navigation along said river, that the defendants in error maintained a structure beyond these lines, out into a navigable stream, and that the collision occurred beyond these lines out in the river. It seems to us that in the light of this testimony that it should have been left to the jury to decide as a fact in the case whether

or not the defendants in error were guilty of negligence in maintaining a structure, without authority, in a navigable river, beyond and outside the established harbor lines, and, if so, whether or not this was the proximate cause of the injury.

We respectfully contend that upon consideration of the whole record that the final judgment rendered herein February 17, 1909, by the Supreme Court of the State of North Carolina, should be reversed and the cause remanded to the Court below for such further proceedings as to this Court seems proper.

JAMES A. TOOMEY,
Attorney for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 115.

CHARLES GRING, PLAINTIFF IN ERROR,

vs.

LIZZIE IVES AND PAT IVES, BY THEIR FATHER AND NEXT FRIEND, P. H. IVES.

BRIEF FOR DEFENDANTS IN ERROR.

E. F. AYDLETT,
Attorney for Defendants in Error.

CHARLES B. AYCOCK,
Of Counsel.

(21,800.)

SUPREME COURT OF THE UNITED STATES.

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No. 115.

CHARLES GRING, PLAINTIFF IN ERROR,

vs.

LIZZIE IVES AND PAT IVES, BY THEIR FATHER AND NEXT FRIEND, P. H. IVES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR DEFENDANTS IN ERROR.

This was a civil action for damages against the owners of a tugboat for running upon the marine railway of defendants in error. The evidence tends to show that on Christmas Eve, the night of the accident, the tug, which was bound straight down the river, instead of following the usual course, ran in close to the shore and struck the ways so close to the pier, built right on the shore, that after she was hung parties were able to step from the pier on to the guard rail of the boat; that she struck within 40 feet of the shore (page 16), and that the Government buoy marking the landing of the channel and opposite the railways was 800 feet away

(page 17, Record), and the boat, when it struck the ways, was 200 feet out of the channel or regular course; that the captain of the tug was familiar with the channel and the location of the ways, having passed them more than two hundred times, and that in addition to its being a bright clear night there was a huge bonfire burning on a vacant lot near the river shore which lighted up the harbor (pages 16 and 17, Record); that the tug was headed straight for the shore when she struck and would have run into the shore if not stopped by the ways, and that the barge which was in tow broke loose from the tug at the time of the collision and struck a schooner tied to dock on shore not 150 feet away (page 16, Record); that the point where the boat struck was 15 feet inside the end of the pier constructed on other side of ways (page 19, Record), so that boat would have struck this pier itself had she not been stopped by the ways.

ARGUMENT.

Plaintiff in error asked the court to charge the jury (1) upon the whole evidence in the case plaintiffs are not entitled to recover, and you will answer the first issue "No"; and (2) if you believe all the evidence in the case the plaintiffs are not entitled to recover, and you will answer the first issue "No."

These two prayers may be considered together, for what is said about the one applies with equal force to the other. They not only with one fell stroke sweep from consideration of the jury all the evidence of the tug captain's utter recklessness in running hundreds of feet out of the course and heading straight shoreward, regardless of railways, piers, docks, and schooners, but they also involve three propositions which we think erroneous:

(1) That the evidence disclosed the establishment of a harbor line;

(2) That any obstruction beyond an established harbor line is unlawful, and

(3) That defendant would be justified in recklessly or negligently running into even an unlawful obstruction to navigation.

Considering these propositions in the order named, we assert:

(1) There is no evidence of the establishment of a harbor line.

The only evidence tending to show this is the introduction of a map purporting to show the location of certain lines established by the United States Government and the testimony of the tug captain that he "saw them establishing the harbor line in 1900, 1901 or 1902." The establishment of harbor lines is within the power of the legislature, and in this State has been delegated to municipal authorities.

29 Cyc., 302.
Revisal, section 1696.
Bond *vs.* Wool, 107 N. C., 139.
Wool *vs.* Edenton, 115 N. C., 11.

Their establishment, therefore can only be shown by proof of the ordinance, just as any other ordinance. The ordinance not being shown there is no proof.

(2) That any obstruction beyond an established harbor line is not unlawful.

The evidence shows this railway to have been constructed "some 18 years ago"; that referring to harbor line tends to show an establishment if any in 1902, 16 or 18 years after the construction of the ways. Such an ordinance has no

retroactive effect and does not affect structures previously erected.

29 Cyc., 343 and 344 (*b*).

Com. *vs.* Alger, 7 Cush. (Mass.), 53.

(3) That defendant would not be justified in recklessly or negligently running into even an unlawful obstruction.

In the absence of any specific legislation on the subject riparian owners have a qualified property in the water frontage belonging by nature to their land, and a right to construct wharfs, piers, landings, etc., subject to such general rules and regulations as the legislature, in the exercise of its power, may prescribe for the protection of public rights in rivers or navigable waters.

Bond *vs.* Wool, 107 N. C., 148, and cases cited.

And this right extends to deep water or point of navigability.

Bond *vs.* Wool, *supra.*

And by point of navigability is meant such point as is necessary to make his property reasonably available for the purpose constructed.

29 Cyc., 343.

Brainbridge *vs.* Sherlock, *supra.*

As to what is reasonable.

29 Cyc., 305 n. 7.

Mere inconvenience is not an obstruction.

29 Cyc., 312 and 313.

29 Cyc., 343 n. 7.

It will be admitted that railways of this character which are necessities of commerce and for repairing vessels, cannot be constructed without going under water and to deep-water

mark. Otherwise vessels of deep draught could not be hauled out, and therefore the extension is necessary to a reasonable use of the same.

For these reasons it seems to us the structure would not be unlawful but a proper use of their riparian rights by plaintiffs.

The rights of navigation while paramount are not exclusive (Post *vs.* Munn, 7 Am. Dec., 570), and even granting that the railways were absolutely without warrant of law and therefore a nuisance and subject to abatement, parties must yet exercise care and cannot recklessly or wantonly injure them, for they are still private property and entitled to this degree of protection.

29 Cyc., 311 (*h*) and cases cited.
29 Cyc., 318.
Brainbridge *vs.* Sherlock, *supra.*
The Brinton, 66 Fed. Rep., 71, and particularly
29 Cyc., 305 n. 7.

For these reasons it seems to us that plaintiff in error's first and second prayers were clearly erroneous and properly refused.

Third Exception.

Plaintiff in error asked the court to charge the jury: "If you believe all the evidence in the case the plaintiffs were guilty of contributory negligence and you will answer the second issue 'yes.'"

Refused and plaintiff in error excepted.

> "An instruction on the issue of contributory negligence which assumes that if the plaintiff failed to exercise reasonable care, then its neglect was the proximate cause of the injury, is erroneous."
> Brewster *vs.* Elizabeth City, 137 N. C., 392.

The above prayer was therefore properly refused.

Fourth Exception.

Plaintiff in error asked the court to charge the jury, "If you believe from all the evidence in the case the plaintiffs were guilty of contributory negligence, and this contributory negligence was the approximate cause of their injury, you will answer the second issue 'Yes.'"

Refused and plaintiff in error excepted.

The above instruction would take the question of contributory negligence and proximate cause both away from the jury and was therefore erroneous.

"It is essentially the province of the jury to pass on such conduct under proper instructions, and to such acts it is best to apply the rule of the prudent man unless only one inference can be drawn * * *." When the negligence is not so clearly shown that the court can pronounce upon it as a matter of law, the case should go to the jury with proper instructions.

Graves *vs.* R. R., 136 N. C., 3.
Brewster *vs.* City, 137 N. C., 392.
Sheldon *vs.* Asheville, 119 N. C., 610.

Defendant's fifth prayer, which was given by the court, was more than could be expected.

Fifth Exception.

The objection to plaintiff in error's sixth prayer, which was refused by the court, is that it assumes as a matter of law that it is such negligence as would bar a recovery to construct any structure beyond a harbor line or to allow one to stand constructed before the establishment. This is not only wrong for the reasons given regarding the first and second prayer, but for the further reason that when two reasonable minds may come to different conclusions, upon reconsider-

ing the facts in evidence, negligence or contributory negligence is a question for the jury.

Sheldon *vs.* Asheville, *supra,* and other cases cited.

Sixth Exception.

Plaintiff in error's seventh prayer is objectionable for the same reason. It would take the question of contributory negligence from the jury and tells them, in effect, that as a matter of law it is contributory negligence to leave the "cradle" down under the water.

Plaintiff in error's 7th and 8th exceptions relate to the court's refusal to grant the motion for new trial and signing the judgment.

Plaintiff in error has no possible cause of complaint that we can see. The charge of the court shows that the only view submitted to the jury upon which defendant in error could recover was that plaintiff in error had "recklessly or wantonly" run his tug into the ways. The jury have so found.

The case is more or less remarkable. The uncontradicted testimony of all the witnesses shows that plaintiff in error's tug was being most recklessly handled—several hundred feet out of her course—and that at the moment of the collisions he was headed straight for the shore, where she would have struck in a moment more had she not been stopped by the ways, and that it was only the interposition of these 8-feet-wide ways which prevented the tug striking a pier constructed on the opposite side, above the water and in full view, fifteen feet inside its end. It seems to us that plaintiff in error is estopped from crying "hidden danger" when, according to all the testimony, its tug captain was so manifestly regardless of structures in full view that it was only this hidden object which prevented him from tearing them down, and—if that were not sufficient to

stop his destructive progress—plowing up the bank in an effort to establish a new shore line for Pasquotank river.

We submit this court has no jurisdiction of this cause, and defendants pray this appeal be dismissed.

Respectfully submitted,

E. F. AYDLETT,
Attorney for Defendants in Error.

CHARLES B. AYCOCK,
Of Counsel.

GRING v. IVES.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 115. Submitted December 18, 1911.—Decided January 9, 1912.

The act of March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151, authorizing establishment of harbor lines was not intended, and did not operate, to paralyze all state power concerning structures of every character in navigable waters within their borders, or to automatically destroy property rights previously acquired under sanction of state authority. *Cummings* v. *Chicago*, 188 U. S. 410.

In this case the Federal question relied upon is so absolutely without merit, and the grounds are so frivolous, as not to afford a basis for exercise of jurisdiction, and the writ of error is dismissed.

Writ of error to review 150 Nor. Car. 137, dismissed.

THE facts are stated in the opinion.

Mr. James A. Toomey for plaintiff in error:

The record as a whole shows clearly that the claim of Federal rights was asserted from the beginning by the plaintiff in error in such manner as to bring it to the attention of the lower court. The paramount right of navigation in navigable waters was claimed, and it was maintained that any obstruction to navigation without authority from Congress or the legislature was unlawful, constituted a public nuisance, and was a direct violation of the provisions of §§ 9–12 of the River and Harbor Act, March 3, 1899, 30 Stat. 1151. It further appears from the record that the right, privilege and authority claimed under the aforesaid act of Congress were denied by the court below, and consequently this court has jurisdiction. *Appleby* v. *Buffalo*, 221 U. S. 524; 172 U. S. 67.

The substantial question presented is whether the lower

court erred in refusing to instruct the jury that defendants in error, upon all the evidence, could not recover, because the acts of negligence complained against were not the proximate cause of the injury, but that the efficient and proximate cause of said collision and consequent damage was the maintenance by the defendants in error of a public nuisance in a navigable river of the United States, expressly contrary to and in violation of a Federal statute.

The Pasquotank river is a navigable stream, and the defendants in error were not affirmatively authorized by Congress or by any legislative power to construct or maintain a marine railway or any other structure extending into that river one hundred feet beyond the harbor line shown to have been established by the Secretary of War pursuant to the act of Congress. The collision occurred at nighttime at point 36 feet outside the harbor line so established, where the water was 25 feet deep and navigable. The lower court held as a matter of law that whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels, and that it was not shown to be located there illegally or to be a public nuisance.

This doctrine is a denial of the validity and legal effect of the United States statute hereinbefore set forth, and is at variance with decided cases. *Hannibal Bridge Company* v. *United States*, 221 U. S. 194.

If defendants in error had complied with the statute and had not placed an obstruction in a navigable stream, the accident would not have happened. *Atlee* v. *Packet Co.*, 21 Wall. 389; *Grand Trunk Ry.* v. *Backus*, 46 Fed. Rep. 216; *Northern Pacific Ry.* v. *United States*, 44 C. C. A. 136; see also cases reported at 38 Fed. Rep. 614; 9 N. J. Eq. 526; 28 N. Y. 396; 72 Maine, 181; 18 Barb. (N. Y.) 277; 9 Can. Sup. Ct. 259; and cases cited in 90 L. R. A. 59, note 7.

Mr. E. F. Aydlett for defendants in error:

Establishment of harbor lines can only be shown by proof of the ordinance, just as any other ordinance. The ordinance not being shown there is no proof.

Any obstruction beyond an established harbor line is not necessarily unlawful. The evidence shows this railway to have been constructed "some 18 years ago"; that referring to harbor line tends to show an establishment if any in 1902, 16 or 18 years after the construction of the ways. Such an ordinance has no retroactive effect and does not affect structures previously erected. 29 Cyc. 343 and 344 (b); *Commonwealth* v. *Alger*, 7 Cush. (Mass.) 53.

Defendant would not be justified in recklessly or negligently running into even an unlawful obstruction.

In the absence of any specific legislation on the subject, riparian owners have a qualified property in the water frontage belonging by nature to their land, and a right to construct wharfs, piers, landings, etc., subject to such general rules and regulations as the legislature, in the exercise of its power, may prescribe for the protection of public rights in rivers or navigable waters. *Bond* v. *Wool*, 107 Nor. Car. 148. *Brainbridge* v. *Sherlock*, supra.

Railways of this character which are necessities of commerce and for repairing vessels, cannot be constructed without going under water and to deep-water mark. Otherwise vessels of deep draught could not be hauled out, and therefore the extension is necessary to a reasonable use of the same.

The rights of navigation while paramount are not exclusive, *Post* v. *Munn*, 7 Am. Dec. 570, and even granting that the railways were absolutely without warrant of law and therefore a nuisance and subject to abatement, parties must yet exercise care and cannot recklessly or wantonly injure them, for they are still private property and entitled to this degree of protection. 29 Cyc. 305, 311(h), 318; *The Brinton*, 66 Fed. Rep. 71.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Gring, upon the theory that Federal questions were wrongly decided against him, seeks the reversal of a judgment for three hundred dollars, damages occasioned by the running of a tugboat, of which he was the owner, against a marine railway, the property of the defendants in error, who were plaintiffs below. The railway was situated on the shore of the Pasquotank river in the harbor of Elizabeth City, North Carolina. The injury to the railway was committed on the night of December 24, 1905. The Supreme Court of North Carolina, in affirming the judgment of the trial court, rendered on the verdict of a jury, stated these facts (150 Nor. Car. 137, 138):

The marine railway had been in existence for eighteen years prior to the injury complained of. The railway extended to the margin of the channel and between the end of the railway and the opposite side of the channel, which was buoyed, there was a space of 540 feet, constituting the usual highway for navigation. The night upon which the tug collided with the bridge was "a bright moonlight night and there was also a bonfire on shore and a line of electric lights which lighted up the harbor." The conduct which occasioned the running of the tug against the railway was thus stated: "The evidence is that the tugboat, which was bound down the river, instead of following the usual course, ran diagonally towards the shore, and striking the marine railway of plaintiffs, damaged it. The captain of the tugboat testified that he knew the locality well, having passed it more than two hundred times. After the injury he offered to pay damages, but the parties could not agree upon the amount." Commenting upon the facts thus stated, the court observed: "Clearly the proximate cause (of the injury) was the negligence of the tugboat in not proceeding on its course in a channel 540 feet

wide, but going several hundred feet out of its way and driving in shore against the marine railway."

In disposing of a contention concerning an alleged harbor line established under the act of Congress of March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151, and the proposition that the railway, because it projected beyond said assumed line, was a public nuisance, and therefore the complainant was entitled to negligently and wantonly injure it, the court said (p. 138):

"Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show."

The only one of the assignments of error filed at the time this writ of error was sued out which in the remotest way relates to a Federal question is the third, which is concerned with the reasoning of the court just referred to and is based upon the assumption that there could be no recovery because of the asserted establishment by the Secretary of War some time between 1900 and 1902 of a harbor line under the authority of the act above mentioned. In argument the proposition to which the assignment relates is, that the court erred in not deciding that any structure projecting into the river beyond the established harbor line was illegal and a public nuisance which the plaintiff might wantonly injure or destroy. As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years before the establishment of the alleged harbor line. Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899 and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed Federal

right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899 under the sanction of state authority. *Cummings* v. *Chicago*, 188 U. S. 410. See also *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S. 365.

In view of the character of the case, the facts found by the court below and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be

Dismissed for want of jurisdiction.